through a multiplicity of computers, routers and switches that may be anywhere in the world, to ultimately be "reconstituted" as the voice communication began.[9] As discussed below, the FCC is now actively considering rules that define the jurisdictional nature of such calls or determine the appropriate regulatory treatment of them with respect to access charges.

The basic architecture of IP traffic is not widely understood. First, most common forms of "information," which includes visual images, data as well as voice, can be converted into computer digits – zeroes and ones – which, when fed into another computer, can be reassembled to recreate the initial informational form. Second, the information is not merely broken into bits and bytes, it is also "packetized." This means that the overall informational "message" – the photograph of a grandchild for example – is broken up into millions of subcomponents called packets. Each packet has a "header" that tells any computer on the Internet receiving that particular packet its ultimate destination. The computer then charts a routing pattern for that packet designed to move it on towards that destination. Other computers send other packets (portions) of the same picture through different routes. Traveling literally at the speed of light, the packets are scattered to the four winds only to be routed over a vast number of individual routes to the same common destination. There, the digital technology will allow their reassembly into a replica of the original information – a picture in this case, data or even voice in others.

Once information is both digitized and packetized, it can also be enhanced. This happens throughout the digitized world, not merely in telephony. A sound engineer can take a studio recording of a singer and "raise" any note the singer sang flat. A listener purchasing the ultimate

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[9] In the world of packet technology, the distinction between data and voice simply disappears. From the perspective of the computers involved, a voice communication, an email and a video clip are indistinguishable.

recording will have no way to tell that what she is hearing is not what the singer sang. Telecommunications services can similarly be enhanced or modified in any number of ways, some of which are highly visible to the consumer and some of which are not.

ARGUMENT

I.
THE COURT SHOULD DISMISS THE COMPLAINT ON GROUNDS OF PRIMARY JURISDICTION

Plaintiff's Complaint represents an attempt to obtain the Court's assistance in imposing originating switched access charges on VoIP traffic. In an effort to gloss over the fact that its claims raise some of the most complex, controversial and unsettled areas of modern telecommunications law, Plaintiff fails to mention even once in its complaint that this dispute involves VoIP traffic, as Plaintiff well knows. Plaintiff's silence facilitates its misleading characterization of this dispute as a simple billing dispute.

A. The Court Should Dismiss the Complaint on Primary Jurisdiction Grounds Because Concurrent Jurisdiction Over the Matter Could Work at Cross-Purposes

Given the considerable technical complexity of the underlying fact issues presented here, coupled with the impact their resolution will undoubtedly have on our rapidly evolving national telecommunications policy, the Court should exercise its discretion to dismiss the Complaint, without prejudice, pursuant to the doctrine of primary jurisdiction. Dismissal on this basis is appropriate because that is the only result which (a) allows the Court to take advantage of the specialized competence acquired by the FCC in this area and (b) promotes a proper balance between courts and administrative agencies. *Fulton Congregation Assocs v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996) ("The aim of the doctrine ... is to ensure that courts and agencies with concurrent jurisdiction over a matter do not work at cross-purposes."); *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 191 (D. Conn. 1999).

The primary jurisdiction doctrine enjoys a history dating back almost 100 years to *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). *See Tassy v. Brunswick Hospital Center, Inc.*, 296 F.3d 65, 67-68 (2d Cir. 2002) (outlining development of doctrine). Its importance can hardly be overstated, particularly with respect to the circumstances of this case, inasmuch as it serves two principal purposes:

> consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims.

TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002) (quoting *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994)); *see also Gifford v. United States Postal Service*, 6 F. Supp. 2d 135, 137-38 (D. Conn. 1998).

Courts assess a variety of factors when weighing whether to apply the doctrine:

> [C]ourts generally look to four factors. These are: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

Martin v. Shell Oil Co., 198 F.R.D. 580, 585 (D. Conn. 2000) (citing *National Communications Assoc. v. American Telephone and Telegraph Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995)). Each of these factors compels the conclusion that the Court not jump into this controversy at this juncture.

Plaintiff attempts to cast this litigation as simply a case of Defendant not paying certain bills invoiced to it, but that characterization falls far short of properly describing the true issues involved here. Among other things, a key issue in this case is the ultimate question of whether VoIP providers are required to pay access charges at all, and if so, whether Frontier's own tariff

applies to USA Datanet. As such, this case presents important issues and policy concerns that the FCC has already indicated require it to take a careful case-by-case approach to resolve.

As described below, the FCC has made five points very clear regarding these important issues and policy concerns. First, the agency is considering the appropriate access charge treatment for IP-enabled services and VoIP now. Second, the FCC has declined to state what the current law requires with respect to access charges and VoIP. Third, the FCC has stated that different forms of IP-enabled VoIP services may require different treatment, and that the agency is currently examining those differences. Fourth, both in general dockets such as its outstanding *Notices of Proposed Rulemakings*, and in response to Petitions seeking relief on the basis of unique facts and equities, the agency is prepared to step in and rule. Fifth, the FCC intends to retain decisional control over these issues of national importance.

The issues which must be decided in this case include an interpretation of Plaintiff's tariff, an interpretation of the ICA between Plaintiff and PaeTec, and an interpretation of the Act to determine whether ILECs like Plaintiff have the right to impose originating access charges on VoIP traffic at all, and if so, whether Plaintiff has the right to impose originating access charges upon USA Datanet despite the fact that USA Datanet does not exchange any traffic with Plaintiff. These issues are now before the FCC. The interests of consistency and uniformity are served by having the FCC, the federal agency charged with interpreting the Act, provide a national answer to these questions. Therefore, this action should be dismissed, without prejudice, until the FCC has had an opportunity to rule on the parties' claims.

B. The FCC Is Considering Current Policy With Respect to Access Charges Regarding VoIP, Such as the Traffic at Issue Here

The regulatory treatment of VoIP traffic is extraordinarily complex and unsettled, and the Complaint sets forth an incomplete and material misstatement of the applicable law. Services

are not only interstate, intrastate or local, they may also be "basic" or "enhanced." As the FCC has explained:

> [T]he Commission has long distinguished between "basic" and "enhanced" service offerings. In the *Computer Inquiry* line of decisions, the Commission specified that a basic service is a service offering transmission capacity for the delivery of information without net change in form or content. Providers of "basic" services were subject to common carrier regulation under Title II of the Act. By contrast, an "enhanced" service contains a basic service component but also employ[s] computer processing applications that act on the format, content, code protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve the subscriber interaction with stored information.

IP-NPRM, ¶ 25 (Brydges Decl. Ex. B) (citations omitted). "In separate orders, the Commission also determined that exempted enhanced service providers (ESPs) should not be subject to originating access charges for ESP-bound traffic." *Id.* (citation omitted).

Since the FCC has already ruled that ESPs are not subject to originating switched access charges for ESP-bound circuit switched traffic, it is very possible that the FCC will clarify that ESPs are not subject to originating switched access charges for ESP-bound IP traffic. The FCC has already recognized that the issue raises revolutionary and unresolved jurisdictional questions: "Packets routed across a global network with multiple access points defy jurisdictional boundaries." *IP-NPRM*, ¶ 4 (Brydges Decl. Ex. B). The FCC has further emphasized that VoIP traffic raised issues of first impression which warrant its reconsideration of the existing regulatory regime:

> And whereas enhanced functionalities delivered via the PSTN typically must be created internally by the network operator and are often tied to a physical termination point, IP-enabled services can be created by users or third parties, providing innumerable opportunities for innovative offerings competing with one another over multiple platforms and accessible wherever the user might have access to the IP network. **The rise of IP thus challenges the key assumptions on which communications networks, and regulation of those networks are predicated** . . . .

IP-NPRM, ¶ 4 (Brydges Decl. Ex. B) (citations omitted) (emphasis added).

Recognizing that it had an issue of first impression and national significance before it, the FCC raised for express consideration the same central question in its *Notice of Proposed Rulemaking* that Plaintiff in this case asks this Court to decide: whether switched access charges (*e.g.*, out of a Frontier tariff) should be applied to VoIP calls:

> The Commission seeks comment on the extent to which access charges should apply to VoIP or other IP-enabled services. If providers of these services are not classified as interexchange carriers, or these services are not classified as telecommunications services, should providers nevertheless pay for use of the LECs' switching facilities?

IP-NPRM, ¶ 61 (Brydges Decl. Ex. B) (citations omitted). The FCC is also considering the exact question at issue here: whether an enhanced service provider who is not an ILEC's customer can be required to pay access charges to the ILEC for origination or termination of VoIP calls.[10] As such, the question at issue in this case not only "involves technical or policy considerations within the [FCC]'s particular field of expertise" and lies "particularly within the agency's discretion," but it also is being actively considered by the FCC in a currently pending rulemaking proceeding. *See Martin v. Shell Oil Co.*, 198 F.R.D. 580, 585 (D. Conn. 2000) (citing *National Communications Assoc. v. AT&T*, 46 F.3d 220, 222-23 (2d Cir. 1995)).

C. The FCC Has Recognized That This Issue Is Extremely Complicated and Different VoIP Services May Need To Be Subject To Different Rules and Policies

In order to resolve this Complaint, the Court would have to step into the FCC's shoes in order to (1) create a record for review of the various enhanced service permutations that VoIP providers offer and (2) make new law by deciding, *de novo*, which of these enhanced services should be subject to originating switched access charges. The issue of whether, to what extent and at what rate access charges should apply to the various forms of VoIP and other IP-enabled

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[10] *See, e.g.*, Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required To Pay Access Charges To Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers (fil. Aug. 20, 2004) (Brydges Decl. Ex. F).

services is one of the most contentious and currently fluid issues under consideration by the FCC. However, the FCC has been unwilling to make any general applicable statements or rulings regarding this issue before it has compiled a comprehensive record and fully considered the complex tangle of policy, technology and law it raises, in part due to its express recognition that the question of whether and where access charges should apply may not have a single, or a simple, answer.[11] As the Commission has explained:

> IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services. IP-enabled services, moreover, have increased economic productivity and growth, and bolstered network redundancy and resiliency. Our aim in this proceeding is to facilitate this transition, relying wherever possible on competition and applying discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives. **We expressly recognize the possibility that we ultimately will need to differentiate among various IP-enabled services.**

IP-NPRM, ¶ 5 (emphasis added). Although the FCC has yet to announce its regulatory policy regarding VoIP traffic, the agency has explicitly and repeatedly ruled that *it*, and not others, will set that policy. In preempting state regulation of the VoIP service offered by Vonage, the FCC emphasized that it alone intends to set national policy regarding VoIP services, even to the extent of preempting state authority:

> **We conclude that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules.** In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP – the *Pulver Declaratory Ruling* and the *AT&T Declaratory Ruling* – by making clear that **this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities.**

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[11] *See generally* Developing a Unified Intercarrier Compensation Scheme, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001) (Brydges Decl. Ex. G) (seeking to resolve inter-carrier compensation issues, including VoIP issues).

Vonage Holdings Corp., Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 19 FCC Rcd 22 (2004) ("*Vonage*") (Brydges Decl. Ex. H) (emphasis added) (citations omitted). Under these circumstances, this Court should be extremely reluctant to step in and rule where the FCC itself is in the process of deciding these issues and has reserved the ability to do so.

D. Outstanding FCC Rulemakings and Responses to Various Petitions for Declaratory Rulings Suggest the FCC Will Soon Clarify Issues Raised by Plaintiff

The Court should also refer this dispute to the FCC because only the FCC can appropriately decide whether the types of regulatory relief that Plaintiff seeks are reasonable, and the FCC has announced its intention to do so in the near future. Plaintiff, as noted above, is seeking money damages from Defendant with respect to its originating switched access claims; USA Datanet is not an IXC with respect to the traffic involved in this case, and would not be liable for access charges here under any circumstances. *See* Declaration of Edward F. White dated March 31, 2005 ("White Decl.") at ¶¶ 7-11. Plaintiff treats this issue as if the jurisdictional locus of an IP-enabled call were a routine matter. It is not. VoIP makes it possible for users on the PSTN to dial ordinary 10-digit telephone numbers and "call" the ESP's customers on the Internet. Because PSTN users cannot dial an Internet IP address on the Internet, however, the ESPs obtain telephone numbers from regulated telephone companies, which may be ILECs such as Plaintiff or CLECs, just like any large corporation or end-user. Rather than being associated with a physical, geographic address on the PSTN, these numbers are associated with personal computers operating through the Internet. Moreover, because the numbers are associated with a computer and not a land line, the customer can take its phone service anywhere from New York to the Netherlands and still receive inbound "local" calls. As the FCC has already recognized, "Packets routed across a global network with multiple access points defy jurisdictional boundaries." *IP-NPRM*, ¶ 4 (Brydges Decl. Ex. B).

Plaintiff's request for relief is based upon its own (incorrect) assumptions regarding a plethora of engineering, commercial, legal and regulatory issues that are the standard and appropriate province of regulators – not courts. Plaintiff's entire Prayer for Relief is predicated on its own, self-serving assumption that it is entitled to charge tariff-based originating switched access charges for *all* of the traffic of all of Defendant's ESP customers. What if the FCC subsequently confirms – as many expect it to do – that Plaintiff's assumption is wrong? What if the FCC maintains its current course and rules mandating that ILECs like Plaintiff *cannot* impose originating access charges on IP-Enhanced calls? What if the FCC determines that *most* of the traffic in this case is exempt from originating access charges? What would happen to providers of VoIP service (including USA Datanet) and their customers when traffic is improperly rerouted to access trunks which automatically produce invoices including access charges on each call? What would the effect of such a result be on the development of competition in the VoIP market? The range of questions such as this could go on virtually indefinitely.

Once the Plaintiff's mischaracterization of its Complaint as involving a simple billing dispute is dispelled, it becomes clear that the actual questions at issue in this dispute require technical expertise and regulatory authority beyond that available to the Court, and go to one of the very reasons for Congress creating the FCC. This Court should require Plaintiff to seek relief instead from the FCC, instead of bypassing it and potentially circumventing an FCC ruling with which it may disagree.

E. The Court Would Have to Apply Undetermined FCC Policy in Interpreting Federal Tariffs and ICAs In Order to Resolve the Claims Raised in the Complaint

Even Frontier's simple claim of non-payment for goods ordered and delivered implicates considerations more appropriately addressed by the FCC. Plaintiff claims that "USA DataNet has not paid and refuses to pay for said invoiced interstate originating access service charges,

despite due demand therefore and complete failure to set forth a proper objection." (Complaint, ¶ 25). The allegation is not true: Defendant has never ordered service out of Plaintiff's tariff, but instead has purchased originating service from PaeTec.[12]

Plaintiff does not describe *how* Defendant allegedly ordered service out of Plaintiff's tariff. However, for purposes of this motion, the most important fact is that this Court, in addition to examining the ICA between PaeTec and Plaintiff, would have to sift through Plaintiff's federal tariff, interpret its language, and compare it to other tariffs for reasonable construction against the backdrop of still-developing federal policy, which could change as this case is pending before this Court. Courts are ill-equipped to make this determination. *U.S. Western Pacific Railroad Comp.*, 352 U.S. 59, 65, 77 S. Ct. 161, 166 (1956) (refusing to determine which of two I.C.C. freight tariffs applied, because the courts must not only refrain from making tariffs, but, under certain circumstances, must also decline to construe them as well"); *Access Telecommunications, LLC v. Southwestern Bell Tel Comp.*, 137 F.3d 605, 609 (8th Cir. 1998) (refusing to make a determination as to whether the ILEC correctly followed its own tariff).

Policy issues aside, the Court will require an intimate understanding of technical regulatory terms applied to developing technology. Courts have had consistently dismissed cases where an agency was so obviously better equipped for this task, by statute. "[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that the inquiry is essentially one of fact and of discretion in technical terms, then the issue of tariff must first go to the

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[12] White Decl. ¶¶ 4, 7, 11. Moreover, USA Datanet has repeatedly informed Plaintiff that (1) USA Datanet does not owe Frontier any access charges because it is not required, as a VoIP provider, to pay access charges and, in any event, (2) Plaintiff's tariff does not apply to USA Datanet because USA Datanet has not ordered, and has not received, service pursuant to that tariff. White Decl. ¶ 12.

Commission." *U.S. Western Pacific Railroad Comp.*, 352 U.S at 66, 77 S. Ct. at 166; *see also Access Telecom*, 137 F.3d at 609 (refusing to interpret matter relating to circuit designs, signal transmissions, noise attenuation, echo return loss, phase jitter, and other technical terms).

Here, this Court would have to define, for the purposes of reaching a conclusion, each question now under consideration at the FCC, including issues regarding the carriage of VoIP traffic, regulatory differences between analog and digital traffic) each depending upon whether it is VoIP or other traffic), whether "meet point trunks" have and /or should have been used in this case, and intricacies of enhanced and information services for the purposes of applying either a tariff term or term from an interconnection agreement, all of which are subject to a variety of state and federal requirements under the plenary jurisdiction of the FCC. For those reasons and for the purpose of consistency of a uniform, national telecommunications policy, this Court should dismiss Plaintiff's Complaint and leave it to seek redress at the FCC.

II.
THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. A Complaint That Fails To State A Claim Upon Which Relief Can Be Granted Must Be Dismissed

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). While a complaint's well-pleaded allegations must be accepted as true and all reasonable factual inferences must be drawn in the pleader's favor on such a motion (*see Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996)), a court need not credit a complaint's bald assertions or legal conclusions. *Id.* Accordingly, the Court is not bound to accept the truth of "legal conclusion[s] couched as factual allegation[s]." *Jazini v. Nissan Motor Corp.*, 148 F.3d 181, 185 (2d Cir. 1997).

Under certain circumstances, materials beyond the pleadings may be considered in deciding a Rule 12(b)(6) motion. For example, where, as here, the claims are based upon documents integral to the pleadings, such documents may be considered. *I. Meyer Pincus & Assoc. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991). Additionally, a court may consider matters of public record when deciding a motion to dismiss under Rule 12(b)(6). *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998). Included among these types of public records are documents pertaining to regulatory proceedings. *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998).

B. Plaintiff Has Asserted a Legal Theory That is Not Cognizable as a Matter of Law And Has Failed to Allege Sufficient Facts to Support a Cognizable Legal Claim

The FCC has held that "[t]here are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract." *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, ¶ 8 (2002) (Brydges Decl. Ex. I). Here, Plaintiff did not, and cannot, allege that USA Datanet has violated any Commission rule requiring USA Datanet to pay the charges Plaintiff seeks. Likewise, Plaintiff did not, and cannot, allege that Plaintiff and USA Datanet are signatories to any type of contract. Rather, Plaintiff has alleged that USA Datanet has a duty to pay interstate originating access charges pursuant to an unspecified tariff, presumably Plaintiff's interstate access tariff, F.C.C. No 1.

A carrier has a duty to pay charges pursuant to a tariff only if it has both ordered and received service from that tariff.[13] A carrier can order service from a tariff in only one of two

[13] *See, e.g., Mincron SBC Corp., v WorldCom, Inc.*, 994 S.W.2d 785, 789 (Tex. Ct. App. 1999) (explaining that under the filed rate doctrine, "the tariff exclusively controls the rights and liabilities of the parties as a matter of law . . . [and] customers are conclusively presumed to have constructive knowledge of [a tariff's] contents and the effect of published tariffs.").

ways. First, the carrier can order service from a tariff by complying with the procedures delineated in the tariff for ordering service. *Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 687 (E.D. Va. 2000). Second, the carrier can be deemed to have constructively ordered from the tariff even if the ordering procedures set forth in that tariff were not strictly followed. *Id.* Under the constructive ordering doctrine, a carrier is considered to have constructively ordered service if: i) it is "interconnected in such a manner that it can expect to receive access services; [ii)] fails to take reasonable steps to prevent the receipt of access services; and [iii)] does in fact receive such services." *Id.* at 685.

Apart from making the general allegation that Plaintiff has provided USA Datanet with interstate originating access service, *see* Complaint at ¶ 22-23, the Complaint is silent with respect to the relationship between Plaintiff and USA Datanet, or the manner in which Plaintiff allegedly provided interstate originating access service. Moreover, Plaintiff did not, and cannot, allege that USA Datanet complied with the procedures delineated in any of Plaintiff's tariff for ordering service from Plaintiff. *See* White Decl. at ¶¶ 4, 7, 11.

Plaintiff likewise did not, and cannot, allege that USA Datanet has constructively ordered service from any of Plaintiff's tariffs. First, USA Datanet is not "interconnected in such a manner that it can expect to receive access services" from Plaintiff, because USA Datanet does not interconnect directly with Plaintiff at all. *See id.* ¶ 11. Instead, USA Datanet is interconnected with PaeTec, the third-party CLEC from which USA Datanet purchases originating telecommunications services. Second, USA Datanet has taken "reasonable steps to prevent the receipt of access services," because USA Datanet purchases originating telecommunications service from, and interconnects directly with, PaeTec, which has an ICA with Plaintiff that explicitly addresses the traffic, rather than interconnecting with Plaintiff. *See*

id. ¶¶ 7, 11.[14] Third, USA Datanet does not "in fact receive" any services listed in any of Plaintiff's tariffs. *See* White Decl. at ¶ 11 ("Datanet took no service from Frontier."). Plaintiff's tariffs contain very specific descriptions of the services provided pursuant to those tariffs. Apart from the fact that USA Datanet could not receive any services listed in any of Plaintiff's tariffs because USA Datanet does not directly interconnect with Plaintiff and purchases originating telecommunications services from PaeTec, USA Datanet does not use all of the elements listed in any of the services listed in any of Plaintiff's tariffs. *See id.* ¶ 7. Under the Filed Tariff Doctrine, the tariff must be applied only and exactly according to its terms. *See AT&T v. Central Office Telephone*, 524 U.S. 214, 220-25 (1998). Plaintiff simply cannot base a claim for breach of a tariff on USA Datanet's failure to order or obtain service pursuant to Plaintiff's tariff. Accordingly, even accepting the allegations of the Complaint as true, Plaintiff has failed to state a cause of action for breach of tariff.

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[14] A copy of the current ICA between Frontier and PaeTec is appended to the White Decl. as Exhibit B. The obligation of an ILEC like Plaintiff to permit CLECs like PaeTec to interconnect with its network is set forth in Sections 251 and 252 of the Act, as well as the FCC's rules and decisions interpreting the Act, and it is effectuated through ICAs entered into between ILECs and CLECs pursuant to Section 252 (a)(1) of the Act. See 47 U.S.C. §§ 251, 252. Importantly, the Frontier/PaeTec ICA also explicitly addresses Internet Telephony traffic, including the type of traffic at issue here, and sets forth the respective rights and obligations of Plaintiff and PaeTec with respect to that traffic. Imposition of additional originating switched access charges on a third-party like USA Datanet, for traffic explicitly covered by the ICA between Plaintiff and PaeTec, would result in double recovery for Plaintiff and thereby violate the Act and the FCC's rules. *See, e.g.*, 47 U.S.C. §§ 201-202; 47 C.F.R. § 51.703 ("Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier. . . . A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.") (emphasis added).

CONCLUSION

For the foregoing reasons, USA Datanet's motion to dismiss should be granted. USA Datanet respectfully requests that the Court (1) dismiss the Complaint, without prejudice, and refer Plaintiff's claims to the FCC, or, in the alternative (2) dismiss the Complaint with prejudice for failure to state claims upon which relief can be granted, and (3) grant USA Datanet such other and further relief as the Court deems just and proper.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRONTIER TELEPHONE OF ROCHESTER, INC.,

PLAINTIFF,

v.

USA DATANET CORP.,

DEFENDANT.

DECLARATION OF EDWARD F. WHITE

No. 05 CV 6056 (CJS)

EDWARD F. WHITE, under penalty of perjury, declares as follows:

1. I am currently the Vice-President and a partner in WCW Networks, LLC located at 218 N. Wellwood Avenue, Suite 4, Lindenhurst, New York, 11757. In this capacity, I provide consulting services support to new entrant local exchange carriers (LECs) in all aspects of telecommunications. I have a B.S. in Electrical Engineering from New York Institute of Technology and received my J.D. from New York Law School, where I specialized in telecommunications law. I also am a member of the Suffolk County Bar Association. I submit this declaration in support of the motion of defendant USA Datanet Corp. (Datanet) to dismiss the complaint of plaintiff Frontier Telephone of Rochester, Inc. (Frontier) on the ground that the Federal Communications Commission (FCC) has primary jurisdiction of this dispute.

2. My prior work experience includes assignments with Western Electric, New York Telephone, and NYNEX/BellAtlantic. Other professional assignments include negotiating interconnection agreements for several competitive LECs (CLECs), implementing corporate and regulatory requirements for new CLECs, analyzing UNE-

Platform rate implementation, negotiating billing and collection contracts for third party billing, and providing expert testimony for CLECs in various regulatory proceedings.

3. I have handled a wide variety of responsibilities during my telecommunications career, including engineering, marketing and regulatory assignments. I was a member of the original interconnection negotiating team put together by NYNEX after passage of the Telecommunications Act of 1996 and have also served as a Subject Matter Expert (SME) at a number of state regulatory proceedings in New York and New England. I provide ongoing consulting services to Datanet and am familiar with the factual background underlying Frontier's claims

4. The claims set forth in Frontier's Complaint, which I have reviewed, should be resolved in the first instance by the FCC, which has primary jurisdiction of disputes such as these. Its request for relief is based upon a plethora of engineering, commercial, legal and regulatory assumptions that are the standard and appropriate province of regulators rather than courts. Indeed, Frontier's entire prayer for relief is predicated on the assumption that it is entitled to impose tariff-based originating switched access charges on Datanet even though it exchanges no traffic with Datanet and Datanet ordered no service from Frontier. As set forth below, that assumption is incorrect.

5. Overall, Frontier's complaint grossly oversimplifies the nature of the parties' dispute. The "Filed Tariff Doctrine" (colloquially known as the "filed rate doctrine") upon which Frontier relies, in its simplest form, requires a party receiving tariffed services to pay the rate stated in the filed tariff.

6. Under the filed rate doctrine cited by Frontier at paragraph 20 of its Complaint, it asserts that the submission of a bill based upon rates from a valid tariff requires payment,

although it acknowledges that the party receiving the bill can file a complaint in opposition to the application of the tariffed rate.

7. Yet nothing in Frontier's tariff (the relevant portions of which are attached as Exhibit A) addresses Datanet's service arrangement, an arrangement which involves Datanet using tariffed services provided by carriers *other than* Frontier and Ogden Telephone Company (OTC), namely Paetec Communications, Inc. (Paetec). Frontier's Tariff F.C.C. No. 1, at section 2.4.7, addresses the joint provision of Originating Switched Access Service (when such service uses the line side of the circuit switch, it is commonly known in the industry as Feature Group A service, or FGA) *only when that service is jointly provided by Frontier and OTC.* The remainder of the section discusses Meet Point Billing for services other than FGA. In this case, billing consistent with the tariff is expressly limited to jointly provided Frontier/OTC FGA services. When all is said and done, the plain language of Frontier's tariff does not address the services that Datanet has utilized, which were provided by Paetec, rather than Frontier and OTC.

8. Moreover, Frontier cannot argue that Datanet takes service under the specific terms of Frontier's interstate FGA access tariff. As but one example, Section 6.2.1(4) of Frontier's Tariff FCC No. 1, Original Page 6-39, in its description of FGA service, states that "a seven digit local telephone number assigned by the Telephone Company is provided for access to FGA switching in the originating direction. The seven digit local telephone number will be associated with the selected end office switch and is of the form NNX-XXXX."

9. In Datanet's case, the seven digit local telephone number dialed by Datanet's customers is not assigned by the "Telephone Company," *i.e.*, Frontier, but is instead

assigned by PaeTec. Thus, it cannot be claimed that Frontier is providing FGA access service to Datanet under the terms of Frontier's interstate tariff.

10. In addition to Feature Group A, Frontier provides access service as Feature Group B, Feature Group C, and Feature Group D. I have reviewed Frontier's interstate access tariffs which describe those different types of access services, and conclude that none of those services as described in Frontier' s tariff are being provided by Frontier to Datanet.

11. Thus, Frontier does not supply Datanet with the service in question, and Datanet took no service from Frontier. Accordingly, Frontier's tariff does not support its billing of Datanet for services under the filed rate doctrine. One cannot simply extend section 2.4.7 to cover carriers other than Frontier and OTC. The inescapable fact here is that Datanet purchased services from PaeTec and other local carriers, and Frontier has not identified either a relevant tariff or any document that expressly justifies imposition of Frontier's FGA rates on Datanet. (Though Frontier and Paetec have an interconnection agreement, a copy of which is attached as Exhibit B, Frontier and Datanet have no such agreement).

12. Moreover, Datanet has repeatedly informed Frontier that (1) Datanet does not owe Frontier any access charges because it is not required, as a VoIP provider, to pay access charges, and, in any event, (2) Frontier's tariff does not apply to Datanet because Datanet has not ordered, and has not received, service pursuant to that tariff.

13. At a minimum, resolution of Frontier's claims will require a determination whether it has the right under its tariff to impose on Datanet originating access charges even though Datanet exchanges no traffic with Frontier. Resolution of this question –

fraught as it is with complex and interweaving issues of technology, federal regulatory policy, and statutory construction – should be referred to the FCC.

14. Other entities' tariffs shed light on the infirmity of Frontier's claims. For example, the tariffs of both the National Exchange Carrier Association, Inc. (NECA) and Citizen Telecommunications Companies (Citizens) clearly address the issue.

15. NECA is a respected national association whose tariff is the model used by many, if not most, carriers and in fact may have been used as a model to some degree by Frontier.

16. Citizens is the corporate parent of Frontier and its tariff specifically addresses Citizens' joint provision of FGA service with other carriers. This stands in stark contrast to the Frontier tariff in the current situation.

17. Looking at Citizens' Tariff FCC No. 1 (the relevant portions of which are attached as Exhibit C), section 2.4.5, it clearly describes the requirement for the provision of access service by multiple carriers. It offers two versions:

1) The Single Billing Company Version, where the single billing company will notify the customer in writing and the customer will place an Access Service Request (ASR) with the single billing company. The Telephone Company receiving the ASR will arrange to provide the service, determine the applicable charges and bill the customer for the ***entire*** service.

2) The Meet Point Billing Version, which has either a single bill or multiple bill approach, but with either version the Telephone Company must notify the customer of: the option that will be used, the Telephone Company(s) that will render bills, the Telephone Company(s) to whom payment(s) should be remitted and the Telephone Company(s) that will provide the bill inquiry function.

18. Not only does Frontier's tariff not cover this issue, Frontier failed to follow any of the steps required by its parent company relating to the joint provision of FGA. This is not surprising, since Frontier *did not provide Datanet with any FGA service.* Interestingly, Citizen's tariff and its subsequent treatment of jointly provided service is critical because, as a wholly owned subsidiary, Frontier should have understood the issue of jointly provided originating switched access FGA service.

19. In addition, the NECA Tariff FCC No. 1 also details the requirements for jointly provided originating switched access service. At section 2.4.7, the tariff requires Telephone Companies providing joint originating switched access service to notify the customer in writing of the billing method to be used.

20. The NECA Tariff, at section 2.4.7 (A), states that when provided by more than one carrier, "Non-Meet Point Billing under a Revenue Sharing Agreement is the generally accepted billing method for feature group A Switched Access Service." Of course, as noted above, Frontier has provided no such revenue sharing agreement.

21. Once again, as in the Citizen Tariff, the NECA Tariff requires in section 2.4.7 (A) (1) that under a Single Company Billing/Revenue Sharing approach, all Telephone Companies jointly providing FGA service will receive an order or a copy of the order from the customer and that the company providing the dial tone will arrange to provide the service, determine the applicable charges and bill the customer for the ***entire*** service in accordance with its Access Service tariff as provided for under a FGA Revenue Sharing Agreement.

22. The NECA Tariff also offers a Meet Point Billing approach when access service is provided by multiple Telephone Companies for FGA. Once again it was required that

both providing Telephone Companies receive an order or a copy of an order from the customer.

23. In sum, Frontier's claims against Datanet, unsupported as they are either by the language of Frontier's tariff or the filed rate doctrine upon which it relies, should be resolved in the first instance by the FCC.

I declare under penalty of perjury that the foregoing is true and correct.

March 31, 2005

s/Edward F. White
Edward F. White

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRONTIER TELEPHONE OF ROCHESTER, INC.,

Plaintiff

-vs-

USA DATANET CORP.,

Defendant.

DECISION AND ORDER

05-CV-6056 CJS

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INTRODUCTION

This is an action in which Frontier Telephone of Rochester, Inc. ("Frontier"), a provider of telephone exchange access service, is suing USA Datanet Corp.

("Datanet"), a provider of voice over internet protocol ("VoIP") voice communication services, to collect interstate originating switched access charges. Now before the Court is Datanet's motion to dismiss the complaint on the grounds of "primary jurisdiction," and alternatively, for failure to state a claim. For the reasons that follow defendant's application is denied. However, the Court will stay this matter pending the issuance of rules by the Federal Communications Commission ("FCC") that ought to resolve the central issue in this case, which is whether and to what extent VoIP voice communication providers such as Datanet are liable to pay access charges to local exchange carriers ("LECs") such as Frontier that handle the VoIP provider's traffic.

BACKGROUND

USA Datanet is a provider of VoIP long distance telephone service. VoIP technology converts the contents of a particular communication into digital packets of information, which it then sends over private networks or over the internet to an end user. These separate packets of information run through various computers, routers, and switches anywhere in the world, and are then "reconstituted" at the destination. Information that has been digitized and packetized in this manner may also be "enhanced" in various ways, which the Court will discuss further below.

As the name implies, VoIP communications are sent at least partially over the internet. However, where the call is being made and/or received by someone using ordinary customer premises equipment ("CPE"), that is, a traditional telephone, VoIP traffic must also travel through the "public switched telephone network" ("PSTN"), where it is handled by LECs such as Frontier, who control the so-called "last mile" to the end-user's phone. Here, according to Frontier, "Datanet's network does not extend the so-

called "last mile" to an end-user customer's home or business. Instead, [LECs], including plaintiff, own, lease and/or resell extensive local telephone networks that extend the last mile to reach the end-user customers." Complaint ¶ 12. In short, Frontier and other LECs "provide the connection between local and long-distance networks for USA Datanet." *Id.* at ¶ 15.

In this regard, Frontier provides two types of "switched access service": "originating access service" an "terminating access service."

> 'Originating access service' occurs when a call originates on a LEC's network and is routed to USA Datanet for completion in another locality. 'Terminating access service' occurs when USA Datanet routes a long-distance call over USA Datanet's network to a local network or through a LEC for completion to an end-user customer in the local area served by the plaintiff.

Complaint ¶ 17. Frontier imposes charges for these services at rates set forth in "tariffs" that it has filed with the FCC. In this case, Frontier is seeking to collect originating access charges from Datanet.

Datanet, however, is not directly "interconnected" with Frontier. Rather, in order to provide VoIP telephone service to its customers, Datanet purchases "originating telecommunication services" from a third-party LEC, PaeTec.[1] Datanet is thus directly "interconnected" with Pae Tec, and PaeTec, in turn, is "interconnected" with Frontier. PaeTec is a signatory to an interconnection agreement "ICA" with Frontier, but there is

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[1]PaeTec is a Competitive Local Exchange Carrier ("CLEC"), while Frontier is an Incumbent Local Exchange Carrier ("ILEC"). For a brief discussion of the difference between an ILEC and a CLEC, see *Competitive Telecommunications Ass'n v. F.C.C.*, 309 F.3d 8, 10 (D.C. Cir. 2002). In short, ILECs are former Bell Operating Companies, who inherited AT&T's local exchange facilities after the breakup of AT&T. The Act requires ILECs to lease certain network elements to their competitors, the CLECs, who in turn provide services to third parties. *Id.*